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30 Tips for Excellence in Juvenile Defense

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THE VIRGINIA CHAMPION

30 Tips for Excellence in Juvenile Defense

By Julie E. McConnell

Julie E. McConnell is a Clinical Law Professor and Director of the Children’s Defense Clinic at the University of Richmond School of Law. Through the clinic, she and her students represent indigent children in delinquency cases and handle serious offender reviews. The clinic also represents adults seeking resentencing due to *Miller v. Alabama* on mandatory life sentences they received as minors. Additionally, the clinic represents guardians seeking custody of undocumented children in special immigrant juvenile status cases.

1. Remind clients about dressing appropriately for court, removing earrings, covering tattoos, standing or sitting still, etc.

2. Thoroughly and carefully explain options, collateral consequences, and trial/appellate rights, in age appropriate language.

3. Try to invest prosecutors in the rehabilitative goals of juvenile justice.

4. Try to send cases back to diversion or get them Taken Under Advisement (TUA). * 80% of juvenile cases are eligible for diversion. Diversion is often skipped or denied because of minor technical problems, e.g. a parent not following through. We should be trying to get the court to give it a second chance in these situations.

We are missing the boat on diversion.
According to DJJ, in fiscal year (FY) 2016:
There were 56,609 juvenile intake complaints.
Of those, 38,986 (68.9%) resulted in a petition and/or detention order at the intake decision point.
45,691 (80.7%) of all juvenile intake complaints were eligible for diversion, but
Only 7,547 (16.5%) were diverted, and
5,279 (11.6%) were resolved or unfounded.
Diversions include unsuccessful (with or without a petition), successful, and open diversions. Intake complaints may have been diverted, resolved, or unfounded without being diversion-eligible. Other intake dispositions may include returned to probation supervision, returned to out-of-state, consent agreement signed, shelter care, pending, court summons, accepted via Interstate Compact for juveniles, and adult criminal.

5. Avoid Probation. In 2016, only 37.3% of all new probation cases were for felony offenses, according to DJJ. Most misdemeanor cases don’t need probation supervision.

6. Ask for competency evaluations when appropriate. Many kids are not competent and cannot be restored to competency.

•According to a UVA study, in 2009, out of 563 youth ordered into restoration services, only 72% were restored to competency, usually within 90-120 days and only about half of those with ID were able to be restored.

7. Prepare your clients (and their parents) to interact in a respectful and polite manner in court, say yes ma’am, no ma’am, etc.

8. File for discovery and Brady. Reach out to the prosecutor early and often to discuss the case so you know what Brady to demand. Do your own investigation. Remind prosecutors of their duty to turn over exculpatory sentencing information.

9. Understand graduated responses to delinquent behavior in your jurisdiction. Try to keep your client on the lowest rung of the ladder. It never hurts to argue that there are compelling reasons to take an additional offense under advisement, treat it as a CHINS, or even send it back to diversion.

10. Understand DJJ's Decision-Making Tools to try to reduce disparity in treatment that is currently resulting in the overrepresentation of minorities and children with disabilities throughout the system:

- **DAI**--The Detention Assessment Instrument is designed to enhance consistency and equity in the decision to detain and to ensure that only those juveniles who represent a serious threat to public safety are held.
- **YASI**--The Youth Assessment and Screening Instrument includes information on the juvenile's contacts with the criminal justice system.
- **Length of Stay**—The Guidelines seek to promote accountability and rehabilitation by using data driven decision-making to support a juvenile's successful re-entry from commitment to the community. The LOS Guidelines were recently amended because they were the longest in the country.
- **Structured Decision Making**—DJJ is currently preparing a structured decision making matrix that should be available statewide.
- **Understand the Length of Stay guidelines for indeterminately committed youth.** See <http://www.djj.virginia.gov/pdf/residential/Guidelines-for-Length-of-Stay.pdf>

11. Go to the clerk's office and review the file.

- Reviewing custody and/or abuse and neglect paperwork can help you more fully understand your client's history.
- Review subpoena requests and returns in the court file to get a handle on the witnesses the Commonwealth may call.
- There may be enlightening prior psychological reports for our clients or members of their family.
- There may be letters from pretrial, diversion, probation, or other agencies of which you will want to be aware.

12. Use §16.1-266.1 to get school, mental health, medical and other records. Tell prosecutor when school has already punished your client. They often don't know. Try to get your client back in school.

- §16.1-266.1. Any state or local agency, department, authority or institution and any school, hospital, physician or other health or mental health care provider shall permit a guardian ad litem or **counsel** for the child appointed pursuant to this section to **inspect and copy, without the consent of the child or his parents, any records relating to the child whom the guardian or counsel represents upon presentation by him of a copy of the court order appointing him or a court order specifically allowing him such access.**

School Suspensions and Expulsions

- **Legal Aid Justice Center's Suspended Progress report reveals that, during the 2015-16 school year:**
 - ◊ Virginia schools issued over 131,500 out-of-school suspensions to over 70,000 students, marking an increase in the Commonwealth's suspension rate after four years of a downward trend.
 - ◊ Students with disabilities were suspended at rates 2.6 times higher than that of non-disabled students; African-American students were suspended at rates 3.8 times higher than Hispanic and white students.

Disorderly Conduct

- The vast majority of all suspensions were issued for minor offenses, with approximately two-thirds of all suspensions issued for behavior offenses like: possession of cell phones, minor insubordination, disrespect, and using inappropriate language.

13. Use §16.1-274.2. This code section allows for the use of educational records in the guilt phase of school-based cases when relevant to intent.

§ 16.1-274.2. Certain education records as evidence.

- A. In any proceeding where (i) a juvenile is alleged to have committed a delinquent act that would be a misdemeanor if committed by an adult and whether such act was committed intentionally or willfully by the juvenile is an element of the delinquent act and (ii) such act

was committed (a) during school hours, and during school-related or school-sponsored activities upon the property of a public or private elementary or secondary school or child day center; (b) on any school bus as defined in § 46.2-100; or (c) upon any property, public or private, during hours when such property is solely being used by a public or private elementary or secondary school for a school-related or school-sponsored activity, the juvenile shall be permitted to introduce into evidence as relevant to whether he acted intentionally or willfully any document created prior to the commission of the alleged delinquent act that relates to (a) an Individualized Education Program developed pursuant to the federal Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq.; (b) a Section 504 Plan prepared pursuant to § 504 of the federal Rehabilitation Act of 1973, 29 U.S.C. § 794; (c) a behavioral intervention plan as defined in 8VAC20-81-10; or (d) a functional behavioral assessment as defined in 8VAC20-81-10.

14. Request psychological evaluations and/or social histories when you believe they would be mitigating.

15. Understand the impact of childhood trauma on future criminal involvement and the ways in which protective factors and resiliency reduce delinquency. Then advocate for dispositions that are trauma-informed.

16. Make sure to remind your clients that they may be drug tested anytime they come to court.

17. Familiarize yourself with evidence-based responses to trauma in your community. For example:

- **Multi-Systemic Therapy**—home-based intervention that focuses on improving the home environment and providing structure.
- **Family Functional Therapy**--The FFT clinical model concentrates on decreasing risk factors and on increasing protective factors that directly affect adolescents, with a particular emphasis on familial factors.
- **Aggression Replacement Therapy**—focuses on teaching adolescents to replace aggressive behav-

iors with pro-social ones.

• **Trauma-focused Cognitive Behavioral Therapy**—Teaches new skills to process thoughts and feelings regarding trauma.

◊ See [Transformation through Accommodation: Reforming Juvenile Justice By Recognizing and Responding to Trauma](#), Eduardo Ferrer

18. Prepare your client for the plea colloquy.

- They should be able to explain to the judge what the terms of the plea will be.
- What will they have to do?
- Will they have to report to probation?
- Will they be on the sex offender registry?
- Will they be drug tested?
- Do they have suspended time, and if so, for how long?
- Send them a letter after court explaining again what happened, what they have to do, and when, if necessary, they have to return to court. Send them a copy of the Order.

19. File motions to suppress when appropriate.

- Read *J.D.B. v. North Carolina* and consider arguing that the case created a Reasonable Child Standard in custody analysis for purposes of Miranda warnings. See **THE UNITED STATES SUPREME COURT ADOPTS A REASONABLE JUVENILE STANDARD IN *J.D.B. V NORTH CAROLINA* FOR PURPOSES OF THE *MIRANDA* CUSTODY ANALYSIS: CAN A MORE REASONED JUSTICE SYSTEM FOR JUVENILES BE FAR BEHIND?** *Marsha L. Levick and Elizabeth-Ann Tierney* <http://njdc.info/wp-content/uploads/2014/10/Levick-Tierney-J.D.B.-and-the-Reasonable-Juvenile-Standard1.pdf>
- **Challenge identification** when at issue. There is strong science undermining the accuracy of witness identification, especially cross-cultural IDs.
- **Challenge evidence** obtained in violation of your client's rights. Many police officers don't believe that kids have Fourth Amendment rights.

20. Change the narrative about your client.

- Be prepared to share mitigating information that might help in negotiations with prosecutors and others.
- Request a Social History as well as a PSR in Circuit Court when appropriate and helpful and meet with the individual who prepares it to familiarize yourself with the services available in the juvenile system. Prepare them to testify.
- Consider family members, clergy, teachers, coaches, and others who might be good witnesses for your client.
- Obtain supportive letters from employers, teachers, counselors, coaches, ministers, etc.

21. Make sure to remind your clients about court dates (Give them one of those free calendars charities send in the mail) and follow-up to remind them to complete dispositional requirements for court.

22. Remind clients to bring documentation to court of completion of community service, Anger Regression Therapy, etc.

23. Make sure your clients know their appellate rights.

24. File motions for reconsideration when appropriate.

25. Educate clients in general about their constitutional rights for future police encounters. Give them a “Know Your Rights” document.

26. Adequately prepare for Serious Offender Reviews.

- Thoroughly familiarize yourself with the statute’s nuances.
- Visit clients at DJJ early to prepare and review allocation or testimony.
- Many judges and prosecutors do not understand SORs and that the entire sentence can be modified if not mandatory.
- Get to know the staff at DJJ and have them testify.

- Understand the transformation that has occurred at DJJ system.

- Avoid mandatory time because it usually can not be suspended in SORs. Can ask use of firearm charges to run concurrently.

- Don’t let prosecutors convince you a plea agreement nullifies SORs. SORs are implicit in any plea agreement involving a serious offender commitment. *Esparza v. Commonwealth*.

- To serve time in DJJ, must be either a direct or indirect commitment. Make sure that a commitment is included in the sentencing if that is what juvenile client wants or they will go straight to DOC.

- ◊In 2016, DJJ spent \$171,588 a year per kid in direct care.

- ◊Argue that it is counterproductive to hold young people beyond the point at which they have been rehabilitated. See Lambie, I., & Randall, I. (2013). The impact of incarceration on juvenile offenders. *Clinical Psychology Review*, 33, 448-459. See also <http://www.djj.virginia.gov/pdf/residential/Guidelines-for-Length-of-Stay.pdf>

27. Familiarize yourself with important juvenile-focused SCOTUS cases:

- Roper v. Simmons (2005)***—Death Penalty is unconstitutional for minors.

- Graham v. Florida (2010)***—No LWOP for non-homicide offenses for minors. Individualized sentencing.

- J.D.B. v. North Carolina (2011)***—Have to consider age in custody analysis for minors.

- Miller v. Alabama (2012)***—No mandatory LWOP for homicide offenses for minors. Life is for the rare offender who is permanently incorrigible.

- Montgomery v. Louisiana (2016)***—*Miller* is retroactive and there must be a meaningful sentencing hearing.

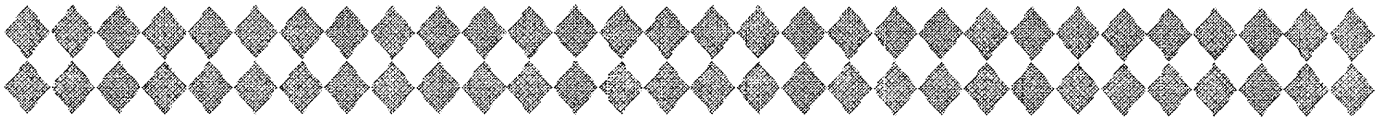
not intend to increase the punishment in Code § 18.2-53.1. Also, one would expect the imposition of a potential maximum life sentence on so common an offense to generate a heated debate—this bill passed unanimously in both the House and Senate. When the General Assembly wishes to impose a life sentence, it knows how to make its intent manifest. The majority further rejected drawing a judicial inference of a legislative intent to impose life in prison as inconsistent with longstanding Virginia practice.

Holding: The trial court erred in ordering that the sentences for appellee’s two convictions under Code § 18.2-308.2 run concurrently. The language of Code § 18.2-308.2 is clear and unambiguous: “The mandatory minimum terms of imprisonment prescribed for violations of this section shall be served consecutively with any other sentence.” The word “any” in the statute unambiguously includes any other sentence, including another sentence under the same code section.

Commonwealth v. Botkin, Rec. No. 0458-17-3

(October 24, 2017)

Facts: Appellee pled guilty to two counts of possession of a firearm by a convicted nonviolent felon. The trial court sentenced appellee to 5 years with 3 years suspended for each conviction. The trial court ran these sentences concurrently. The Commonwealth appealed.



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28. If you are representing a young person on a case in which they are facing significant time, use the language of *Montgomery* and *Miller* to demand the resources necessary to present a capital-like sentencing hearing.

29. Consider victim outreach through an expert or at a minimum through sentencing experts in your office.

30. Ask for experts using the language of *Miller* and *Montgomery* as justification:

- Ask for a **forensic psychologist** to explain adolescent development, family history, remorse, prior delinquent behavior, mitigation, school records, etc.
- Ask for the appointment of a **mitigation expert** to investigate your client’s background and gather all the necessary records to develop a mitigation

case.

- If there is gang involvement, consider a **gang expert**.
- Consider a **reentry expert** to explain how your client can be stabilized in the community if he is allowed a shorter sentence.

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